

Established Custodial Environment:

The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.¹

Interpretation:

The court may be required to apply different standards of proof in deciding a case, depending on whether a custody dispute occurs before or after a custody order has been entered. In both situations, the twelve custody factors must be examined. To order custody before the initial custody order has been entered, the court must decide only that the evidence supports a finding that the best interests of a child are served by the custody order.² Once custody has been established in an order, the court must determine whether an established custodial environment exists with a parent before considering whether custody should be changed.³ If an established custodial environment does not exist, the requirements are the same as those in cases in which a custody order has not yet entered.⁴ If an established custodial environment with a parent exists, the court may only modify the custody arrangement if the evidence is clear and convincing that a change in custody is in the child's best interests. The court is required to find that in the examination of the factors there is clear and convincing evidence of a compelling reason for a change in custody.⁵

Given the different standards of proof involved when there is a post-judgment custody dispute, the question arises concerning the proper role of the investigator. Should the investigator make custody recommendations based on the 12 factors alone, or should the recommendation also consider the sufficiency of the

¹ MCL 722.27(c).

² *Cf. Helms v Helms*, 185 Mich App 680 (1990) (stating rule but finding that trial court reached correct result despite having used a higher standard of proof).

³ *Baker v Baker*, 411 Mich 567 (1981).

⁴ *Baker v Baker*, 411 Mich 567 (1981).

⁵ *Carson v Carson*, 156 Mich App 291 (1986).

evidence to satisfy the burden of proof imposed on the case?

Unfortunately there is no clear legal authority for what an investigative report should encompass. Normally, decisions concerning burden of proof are for the court. However, a report that does not clarify whether it considered the burden of proof may not be of much use to the court or to the parents. Therefore, an investigator should determine how the trial judge wants the issue of the established custodial environment handled in the report.

While the determination of an established custodial environment usually involves a choice between parents, an established custodial environment can exist in more than one home simultaneously.⁶ When this occurs neither parent's established custodial environment can be disrupted except on a showing by clear and convincing evidence, that such a disruption is in the childrens' best interests.⁷ An established custodial environment can also exist in the home of a person who is not a parent or party to the case.⁸

While a court order determines custody it does not necessarily establish a custodial environment.⁹ "Such an environment depend[s] instead upon a custodial relationship of a significant duration in which [the child is] provided the parental

⁶ *Duperon v Duperon*, 175 Mich App 77 (1989) (joint physical custody). An established custodial environment can exist in the homes of each of the parties, notwithstanding the order's provisions concerning custody. *Foskett v Foskett*, 247 Mich App 1 (2001) (joint legal custody with mother having physical custody).

⁷ *Id.* @ 8. Clear and convincing evidence is not necessary to change the terms of a custody order when a change in those terms will not change the established custodial environment. *Mills v Mills*, 152 Mich App 388 (1986).

⁸ *LaFleche v Ybarra*, 242 Mich App 692 (2000) (but the court did not reach the question whether this would be a defacto grant of custody to the grandparents that may not be permissible). *Zuziak v Zuziak*, 169 Mich App 741 (1988). More recent opinions have held that when there is a custody dispute between a parent and a third party, the burden is upon the third party to establish that all relevant factors, including the existence of an established custodial environment and all best interest concerns clearly and convincingly demonstrate that the child's best interests require placement with the third person. *Heltzel v Heltzel*, 248 Mich App 1 (2001); *Greer v Alexander*, 248 Mich App 259 (2001). See also *Eldred v Ziny*, 246 Mich App 142 (2001) where the court applied the parental presumption without finding an established custodial environment.

⁹ *Blaskowski v Blaskowski*, 115 Mich App 1 (1982); *Hayes v Hayes*, 209 Mich App 385 (1995).

care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability, and permanence.”¹⁰

The primary focus of the inquiry is whether an established custodial environment exists, not the circumstances that allowed the custodial environment to be established. Thus, a custodial environment could be established unwittingly or by a person’s wrongful actions.¹¹

An established custodial environment does not exist without parental care, love, guidance, and attention appropriate to the child’s age. Thus, the fact that the mother was frequently away from home leaving her children to the care of babysitters,¹² or a father’s work and extensive involvement with other activities¹³ may keep the parent from establishing a custodial environment. Similarly, an established custodial environment did not exist when the mother’s relationship with the child was marked by tension and the mother’s extremely close relationship with the maternal grandmother interfered with the mother’s interactions with the child, such that child looked primarily to father for guidance and discipline. To determine the existence of an established custodial environment, the circumstances surrounding the care of the children immediately preceding the trial can be examined to determine what interaction the child has had with the parents.¹⁴

¹⁰ *Baker v Baker*, 411 Mich 567, 579-80 (1981).

¹¹ *Moser v Moser*, 130 Mich App 97 (1983) (alleged violation of custody agreement); *Trackhtenberg v Trackhtenberg*, COA 224600 (unpublished 2001) (alleged fraudulent sexual abuse allegations). Both courts noted that the other party’s actions might be considered under the child custody factors to determine the best interests of the children. See also, *Heltzel v Heltzel*, 248 Mich App 1 (2001).

¹² *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492 (1987). The fact that a parent uses babysitters does not preclude that parent from establishing a custodial environment. *Treutle v Treutle*, 197 Mich App 690 (1992).

¹³ *Zuziak v Zuziak*, 169 Mich App 741 (1988).

¹⁴ *Schwiesow v Schwiesow*, 159 Mich App 548 (1987) (mother absent from home during weekdays to attend school, had thereafter been in a coma for three to four months and then had recuperated in another state for 3 ½ months).

The time spent with the child is not the only factor to be considered. The maintenance of a home in the same area, continuation of participation in extracurricular activities, attendance at the same church, regular trips to extended family, financial contributions to the child's well-being, and the child's response to the parent's requests, all were found to support the existence of an established custodial environment.¹⁵

An expectation of permanency in the relationship should also be considered as part of an established custodial environment. The lack of permanency can prevent the establishment of a custodial environment. Thus, when the parents had an upcoming custody trial, there could be no expectation of permanency of the arrangement that had been established by a temporary order.¹⁶ Once an established custodial environment exists, it can be destroyed by the shifting back and forth of a child between custodial homes.¹⁷ However, when the court found that there was an established custodial environment with both the mother and father and that the mother had voluntarily relinquished custody temporarily in order to attend school pursuant to an agreement between the parties, the burden was on the father to establish by clear and convincing evidence that the custodial environment should be changed to him.¹⁸

Considerations for the Evaluator:

- Are there indications the child looks to one parent for guidance, discipline, attention, the necessities of life, and parental comfort?

¹⁵ *Zuziak v Zuziak*, 169 Mich App 741 (1988); *Duperon v Duperon*, 175 Mich App 77 (1989).

¹⁶ *Bowers v Bowers*, 198 Mich App 320 (1993) (child in custody of Mother for one month before trial).

¹⁷ *Baker v Baker*, 411 Mich 567 (1981) (five and one-half month period saw child living with mother in Colorado for one month, his mother and father in Alpena for a week, his mother in Colorado for six weeks, and his father in Alpena for seven weeks in his grandparent's residence).

¹⁸ *Theroux v Doerr*, 137 Mich App 147 (1984). See also *Straub v Straub*, 209 Mich App 77 (1995) (voluntary transfer of custody to grandparents with understanding that the arrangement was to be temporary). More recent authority states that the policy favoring enforcement of agreements to surrender custody voluntarily is not determinative but rather is a factor that must be considered along with other factors in the case. *Heltzel v Heltzel*, 248 Mich App 1 (2001).

Practice Tip: Try to identify specific examples when the child looked to a parent for guidance, discipline, attention, the necessities of life, and parental comfort.

- Is it readily apparent the child looks to one parent for stability, security, and permanence?
- What is the age of the child?
- Does either parent provide love, guidance, and attention appropriate to the child's age?
- Does either parent frequently work an excessive amount of hours?
- Does either parent have an over-reliance on child care providers?
- Has the child moved frequently between the parent's homes?
- Has the child lived in the same community for an extended period of time?
- Has the child participated in the same extracurricular activities, and attended the same religious services for an extended period of time in the same community?
- Does the child have a relationship with extended family members in one community?
- Has either parent contributed financially to the child's well-being?